Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-1130

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEOPLES BANK OF INDIANOLA
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILES CURTISS MCKEE
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QUESTION PRESENTED

Whether the stipulated dismissal of an action pursuant to Fed.R.Civ.P. 41(a)(1) is an appealable order.

CERTIFICATE REQUIRED BY RULE 28.1

Counsel for the Petitioner certify that ninety-three (93%) percent of Peoples Bank of Indianola's common stock is owned by Peoples of Indianola, Inc., a one bank holding company, organized under the Bank Holding Company Act. All branches of Peoples Bank of Indianola are wholly owned and the bank does not have any subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

PEOPLES BANK OF INDIANOLA
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Peoples Bank of Indianola petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 623 F.2d 366 (5th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1980. A timely Petition for Rehearing and Rehearing *En Banc* was denied on October 9, 1980 (Appendix B, p. 3a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291 provides in part:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292 provides in part:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if applicaton is made to it within ten days after the entry of the order . . . .

Fed.R.Civ.P. 41 provides in part:

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

STATEMENT

A. Facts

The EEOC filed a complaint under § 706(f) (1) and (3) of Title VII of the Civil Rights Act of 1964, alleging that the Petitioner had engaged in racially discriminatory hiring practices and had maintained segregated job classifications. The

EEOC's sole jurisdictional basis for suit was an administrative charge filed by Emanuel Walls, an unsuccessful job applicant. The EEOC sought relief for all persons adversely affected by the alleged unlawful employment practices.

During the proceedings, the district court denied the EEOC's request to certify the action as a class action and limited the issues for trial to the individual claim of Walls. (Appendix C, p. 4a). The EEOC's request for reconsideration tion of the class certification issue was denied. (Appendix D, p. 6a).

The EEOC then requested that the bank agree to a stipulated dismissal of the action. The bank agreed and the parties entered into a written stipulation, filed February 23, 1978, pursuant to Fed.R.Civ.P. 41(a) (1) for the dismissal, without prejudice, of the individual claims of Walls. (Appendix E, p. 8a). The EEOC filed a notice of appeal seeking review of the district court's orders denying class certification and reconsideration of the denial of class certification.[1]

B. The Decision of the Court of Appeals

The bank moved to dismiss the EEOC's appeal for lack of jurisdiction on the basis that a stipulated dismissal was not an appealable order. The Court of Appeals ordered that the bank's motion be carried with the case.

The Court of Appeals reversed and remanded, holding that the stipulated dismissal "related solely to the individual claim of Walls" permitting the Court to consider "the propriety of the district court's order rejecting the class-wide action." (Appendix A, p. 2a). The Court concluded that "we need not decide the appealability of the voluntary stipulation of a dismissal without prejudice" and remanded the class certification issue to the district court in light of *General Telephone Co. v. EEOC*, 100 S. Ct. 1698 (1980).

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[1] In its notice of appeal, the EEOC stated that both orders "became final by virtue of the dismissal on February 23, 1978, of the individual claims of the Charging Party." Appendix F, p. 10a.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with the Decisions of the Supreme Court

When a party agrees to the stipulated dismissal of an action, the stipulation is not appealable. *United States v. Procter & Gamble Co.,* 356 U.S. 677, 680 (1958); *United States v. Babbitt,* 104 U.S. 767 (1881).

A voluntary dismissal cannot vest jurisdiction in the courts of appeal because only a party aggrieved by a judgment may appeal. A party who receives all that he has sought is not aggrieved by the dismissal and cannot appeal from it.[2] *Deposit Guaranty National Bank v. Roper,* 100 S. Ct. 1166, 1171 (1980).

B. The Decision Below Conflicts with the Decisions of Other Courts of Appeals and the Decisions of the Fifth Circuit.

Every court of appeals which has considered the issue has held that a stipulated dismissal is not an appealable order. *Management Investors v. United Mine Workers,* 610 F.2d 384, 393 (6th Cir. 1979); *Pipeliners Local Union No. 798 v. Ellerd,* 503 F.2d 1193, 1199-1200 (10th Cir. 1974); *Humphreys v. United States,* 272 F.2d 411, 412 (9th Cir. 1959); *Kelly v. Great Atlantic and Pacific Tea Co.,* 86 F.2d 296, 297 (4th Cir. 1936). Except for the decision below, this has been the rule in the Fifth Circuit.[3] *Yoffe v. Keller Industries, Inc.,* 580 F.2d 126 (5th Cir. 1978), affirmed *per curiam* and rehearing denied, 582 F.2d 982

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[2] The Fifth Circuit Court of Appeals has, up to this point, consistently recognized "adverseness" as a condition precedent to review of a judgment or order. *Haitian Refugee Center v. Civiletti,* 614 F.2d 92, 93 (5th Cir. 1980); *Hlodan v. Ohio Barge Line, Inc.,* 611 F.2d 71, 76 (5th Cir. 1980); *Amstar Corp. v. S. Pac. Transp. Co.* 607 F.2d 1100 (5th Cir. 1979). See also *Donovan v. Penn Shipping Co.,* 429 U.S. 648, 649 (1977).

[3] At oral argument, although specifically requested to do so by a member of the panel, EEOC could not point to any decision supporting its claim that the Court had jurisdiction of the appeal by virtue of the stipulated dismissal.

(5th Cir. 1978), *cert. denied*, 99 S. Ct. 1231 (1979); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978).

C. The Decision Below Threatens the Uniformity of Federal Procedure and Calls for an Exercise of the Court's Power of Supervision.

Denial of class certification is a procedural ruling, collateral to the merits of the litigation, and appealable only after the entry of a final adverse judgment.[4] *Deposit Guaranty National Bank, supra* at 1172. All of the procedural rulings made by the district court were foreclosed by the voluntary stipulated dismissal. The EEOC had a choice, either to proceed to trial on Walls' individual claims or to dismiss the action. See *Procter & Gamble, supra* at 680. It chose voluntary dismissal. The fact that a party is adversely affected by an interlocutory procedural ruling is not sufficient to establish appellate jurisdiction. *Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 700-701 (6th Cir. 1964); *Pipeliners Local Union No. 798, supra* at 1199-1200.

Rulings on class certification do not create an exception providing appellate jurisdiction. In *Coopers and Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held that the class certification ruling did not fall within the narrow category of circumstances where appeal was allowed prior to final judgment under 28 U.S.C. § 1291. In *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 437 U.S. 478 (1978), this Court held that denial of class certification could not be directly appealed to a court of appeals under 28 U.S.C. § 1292(a)(1). The decision of the Court of Appeals changes a voluntary stipulated dismissal into an involuntary adverse final order. It is without jurisdiction to reverse and remand a stipulated dismissal. By its decision to change the nature of the dismissal, it granted itself appellate jurisdiction over a nonappealable stipulation.

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[4] The parties agree that the stipulated dismissal is the only "final order," if any, within the meaning of 28 U.S.C. § 1291. See Appendix F, p. 10a.

The vice of the Court of Appeals' decision is that it authorizes *de facto* review of interlocutory decisions in contravention of 28 U.S.C. § § 1291 and 1292(b). See *Coopers and Lybrand, supra* at 474; *Sullivan v. Pacific Indem. Co.*, 566 F.2d 444 (3rd Cir. 1977). The decision of the Court of Appeals permits a litigant to refuse to proceed in the district court whenever he suffers an adverse interlocutory ruling, seek a stipulated dismissal, and then obtain appellate review of the interlocutory ruling. This offends the policy against piecemeal litigation.[5] At least three courts of appeals have condemned this practice and have declined to review interlocutory orders under such circumstances. *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1239-40 (9th Cir. 1979); *Hughley v. Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978); *Marshall v. Sielaff*, 492 F.2d 917, 919 (3rd Cir. 1974).[6] Exceptions to appellate jurisdiction must be approached "gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Ass'n., v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).

The stipulated dismissal was not an appealable order. Without an appealable order, the Court of Appeals had no jurisdiction whatever. It ignored the nonappealable nature of the stipulated dismissal to reach an interlocutory issue over which it had no jurisdiction.

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[5] The EEOC never sought a discretionary interlocutory appeal of the adverse class certification rulings pursuant to 28 U.S.C. § 1292(b). *Deposit Guaranty National Bank, supra* at 1172, n. 8.

[6] As the Third Circuit stated in *Marshall, supra* at 919:

> "This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal . . . under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of the trial judges to achieve the orderly and expeditious disposition of cases."

Contra, Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441 (2nd Cir. 1968), *cert. denied* 393 U.S. 846.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

PEOPLES BANK OF INDIANOLA,
Defendant-Appellee.

No. 78-1846.

United States Court of Appeals,
Fifth Circuit,

Aug. 7, 1980.

Rehearing and Rehearing En Banc
Denied Oct. 9, 1980.

Before BROWN, GEWIN and POLITZ, Circuit Judges.

PER CURIAM:

On August 19, 1976 the EEOC filed an action under Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. § 2000e et seq. The action was filed against Peoples Bank of Indianola for alleged racial discrimination presumably based upon the administrative claim filed with it by Emanuel Walls and for relief for all persons "adversely affected by the unlawful employment practices." On January 9, 1978 District Court granted the Bank's motion to limit the issues to the claim of Walls' charge of discrimination. *EEOC v. Peoples Bank of Indianola,* No. GC-119-K (N.D.Miss. Jan. 9, 1978). The Court, viewing the complaint as a class action, also struck the class allegations under *EEOC v. D.H. Holmes,* 556 F.2d 787 (5th Cir. 1977), *cert. denied,* 436 U.S. 962, 98 S.Ct. 3082, 57 L.Ed.2d 1129 (1978), for failure to comply with F.R.Civ.P. 23. *Id.* The EEOC moved for reconsideration of the denial of class certification which was denied. *EEOC v. Peoples Bank of Indianola,* No. GC-119-K (N.D.Miss. Feb. 2, 1978). Subsequently, on February 23, 1978, the parties stipulated for dismissal without prejudice of the individual claim of Walls. *EEOC v. Peoples Bank of Indianola,* No. GC-119-K (N.D.Miss. Feb. 23, 1978). The EEOC appeals.

We hold that the stipulated dismissal related solely to the individual claim of Walls, leaving only the question of the propriety of the District Court's order rejecting the class-wide action.[1] On May 12, 1980, the Supreme Court decided *General Telephone Co. of Northwest, Inc. v. EEOC*, ___ U.S. ___, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), which repudiated *D.H. Holmes*. Since the disposal of the class feature is the only issue left in the case and the Supreme Court held that the approach in *D.H. Holmes* requiring compliance with F.R.Civ.P. 23 is no longer good law, we reverse and remand for action consistent with *General Telephone*.

REVERSED and REMANDED.

---

[1] As this appeal concerns only the District Court's action regarding the class action feature, we need not decide the appealability of the voluntary stipulation of a dismissal without prejudice under *Le Compte* v. *Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) and its progeny.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT

GILBERT F. GANUCHEAU, CLERK

OFFICE OF THE CLERK
October 9, 1980

TO ALL PARTIES LISTED BELOW:
No. 78-1846 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION -vs- PEOPLES BANK OF INDIANOLA (GC-76-119K)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By.....
Deputy Clerk

cc: Mr. Philip B. Sklover
Mr. M. Curtiss McKee

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff

v.

PEOPLES BANK OF INDIANOLA,
Defendant

No. GC 76-119-K

ORDER

The court has before it the motion of defendant to limit issues, and after receiving arguments of counsel and examining the pleadings, the evidentiary materials, depositions and affidavits and exhibits thereto, and being of the opinion that the plaintiff, Equal Employment Opportunity Commission (EEOC), has failed to carry its burden of demonstrating that the complaint filed by it be maintained as a class action, because of findings of fact and conclusions of law contained in the court reporter's notes on file herein; it is

ORDERED

1. That defendant's motion to limit the issues to the complaint of Emanuel Walls' charge of discrimination is sustained.

2. The action instituted by plaintiff, EEOC, although not denominated as a class action, nevertheless seeks class action relief, and the plaintiff has failed to establish the prerequisites necessary under Rule 23, F. R. Civ. P., for the maintenance of a class action, and accordingly, the class action allegations are stricken from the complaint. The action shall hereafter be maintained by EEOC on behalf of Emanuel Walls' individual claims of racial discrimination.

3. On motion of plaintiff to extend the deadline for discovery to January 13, 1978, the defendant not objecting thereto, the deadline is accordingly extended until January 13, 1978, but not to delay the pretrial conference set before the Magistrate on January 18, 1978, and the full evidentiary trial of this case set at 9 a.m. on February 8, 1978, in the United States Courthouse at Greenville, Mississippi.

This, 9th day of January, 1978.

WILLIAM C. KEADY

Chief Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Plaintiff

v.

PEOPLES BANK OF INDIANOLA,
Defendant

No. GC76-119-K

ORDER

The court has before it plaintiff's motion to reconsider order denying class certification herein. In our view the belatedness of plaintiff's attempt to establish through argument the numerosity requirement of Rule 23 F. R. Civ. P. underscores our prior determination that, in this protracted litigation the Equal Employment Opportunity Commission (EEOC) has not been an adequate representative of the interests of the alleged class of discriminatees. Moreover, we remain unconvinced that the typicality requirement as applied to EEOC is any broader than that applied to the charging party vis-a-vis the alleged class, when EEOC sues pursuant to 42 USC § 2000-e(f)(1). See EEOC v. D. H. Holmes Co., Ltd, 556 F. 2d 787 (5 Cir. 1977). In the instant context this principle is most important because the charging party admittedly applied merely in an attempt to force his being hired through the threat of litigation. Therefore, the typicality, as well as commonality, of his case with that of other alleged discriminatees now urged by EEOC is patently non-existent.

Thus, we decline reconsideration of our prior order of January 9, 1978, denying class certification, leaving EEOC with the option of either pursuing the charging party's claim individually without detriment to potential discriminatees or seeking classwide relief pursuant to its authorization to bring pattern

and practice suits under § 707 of Title VII without the necessity of complying with Rule 23, F. R. Civ. P.

ORDERED this, the 2nd day of February, 1978.

WILLIAM C. KEADY

Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
v.
PEOPLES BANK OF INDIANOLA,
Defendant.

Civil Action No. GC 76-119-K

STIPULATION FOR DISMISSAL

It is hereby stipulated by the parties to the above entitled action that the individual claims of Emmanuel Walls may be dismissed without prejudice.

Respectfully submitted,

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NORTHERN DISTRICT OF
MISSISSIPPI
FILED

FEB 23 1978

Norman L. Gillespie,
Clerk
By MARL WILKINSON

Deputy

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
v.
PEOPLES BANK OF INDIANOLA,
Defendant.

Civil Action No. GC-76-119K

NOTICE OF APPEAL

Notice is hereby given that the Equal Employment Opportunity Commission the plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the limitation on discovery by Order dated July 11, 1977, and the denial of class certification and refusal to grant reconsideration of the denial of class certification by the Orders of January 8, 1978 and February 2, 1978 respectively which became final by virtue of the dismissal on February 23, 1978 of individual claims of the charging party.

Respectfully submitted,

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APR 17 1978

Norman L. Gillespie, Clerk

By MARL WILKINSON

Deputy

No. 80-1130

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

PEOPLES BANK OF INDIANOLA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1130

PEOPLES BANK OF INDIANOLA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review an order of the district court dismissing the class aspects of the Equal Employment Opportunity Commission's complaint, after the remaining claim of an individual charging party was voluntarily dismissed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 623 F. 2d 366. The order of the district court (Pet. App. 4a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980. A petition for rehearing was denied on October 9, 1980 (Pet. App. 3a). The petition for a writ of certiorari was filed on January 7, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission brought this employment discrimination action under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), alleging that petitioner violated the Act by refusing to hire blacks because of their race and by maintaining racially segregated job classifications (Pet. App. 1a). The action arose out of a charge filed with the Commission by Emanuel Walls alleging that he had been denied employment by the bank because of his race (*ibid.*).

Prior to trial, the district court dismissed the Commission's complaint to the extent that it sought relief for any discriminatees other than Walls on the ground that the Commission had not satisfied the requirements of a class action under Rule 23, Fed. R. Civ. P. (Pet. App. 4a). Subsequently, the court denied the Commission's motion to reconsider its denial of class certification (*id.* at 6a-7a). Thereafter, the Commission entered into a stipulation for the dismissal without prejudice of Walls' individual claims (*id.* at 8a-9a). The Commission then noted an appeal from the order dismissing the class aspects of the action (*id.* at 10a).

The court of appeals held that it had jurisdiction to hear the appeal because the Commission did not challenge the stipulated dismissal, but rather appealed only the district

court's prior order rejecting the class wide action (Pet. App. 2a). On the merits, the court of appeals reversed the district court's order on the basis of this Court's intervening decision in *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), which held that the Commission may seek class wide relief without complying with the requirements of Rule 23 (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 4-6) that the court of appeals lacked jurisdiction to hear the Commission's appeal. This contention is without merit. The court of appeals correctly applied established principles of law regarding appealable orders. Moreover, the question presented in the petition is of little or no practical significance here because the Commission can refile its action and litigate the class aspects of the suit whether or not the court of appeals' decision is reversed. Accordingly, further review here is unwarranted.

1. It is well established that dismissal for failure to meet a prerequisite to suit does not act as an adjudication on the merits and therefore does not bar a subsequent suit on the same claim after the prerequisite has been satisfied. See *Costello* v. *United States*, 365 U.S. 265, 286-288 (1961); *Truvillion* v. *King's Daughters Hospital*, 614 F. 2d 520, 524-525 (5th Cir. 1980); *Mann* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F. 2d 75, 76 (5th Cir. 1973). Therefore, the district court's dismissal of the class aspects of the case on the ground that the Commission had not satisfied the class action requirements of Rule 23, Fed. R. Civ. P., does not preclude the Commission from prosecuting the class claims in a subsequent action.[1] Because this

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[1]Because Walls' individual claims were dismissed without prejudice (Pet. App. 8a), they may also be reasserted in a subsequent suit. See, *e.g.*, 5 Moore's, *Federal Practice* para. 41.05[2] (2d ed. 1980).

Court has held in *General Telephone Co.* v. *EEOC, supra*, that the Commission is not subject to the requirements of Rule 23, the Commission is free to refile its suit and litigate the merits of the class aspects of the case. Thus, further review of the court of appeals' decision would be a largely academic exercise.

2. In any event, the decision of the court of appeals is correct and does not conflict with that of any other court of appeals. It is well settled that a dismissal without prejudice is a final determination for purposes of appeal. See, *e.g.*, *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); *Wecker* v. *National Enameling and Stamping Co.*, 204 U.S. 176, 181-182 (1907); *Elfenbein* v. *Gulf & Western Industries, Inc.*, 590 F. 2d 445, 448-449 (2d Cir. 1978). It is also clear that an order precluding maintenance of class claims is subject to appeal after final disposition of the entire case. *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 336 (1980). Therefore, the order of the district court striking the class allegations from the complaint became final and appealable by virtue of the stipulated dismissal without prejudice of the individual aspects of the case, which left no remaining issue to be litigated.

That the Commission voluntarily agreed to the dismissal of the individual aspects of the case does not preclude appeal of the prior order striking the class aspects. In an analogous situation, this Court held in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), that the United States could appeal an order for production of records, although the order became final only because, at the government's request, the complaint was dismissed for failure to comply with the production order. See also *Raceway Properties, Inc.* v. *Emprise Corp.*, 613 F. 2d 656, 657 (6th

Cir. 1980); *United States* v. *Rent-a-Homes Systems of Illinois, Inc.*, 602 F. 2d 795, 797 (7th Cir. 1979).[2] Similarly here, the Commission appealed only the adverse ruling, to which it never consented, striking its class allegations; it did not seek review of the individual claims that were dismissed by stipulation.

It is true, as petitioner asserts (Pet. 5), that the Commission could have chosen to litigate the individual claims of the charging party, postponing its appeal of the order dismissing the class allegations until after judgment on the individual claims. However, it was not required to take that course, which would have involved needless duplication and inefficient use of the time and resources of both the district court and the EEOC.[3]

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[2] *United States* v. *Babbitt*, 104 U.S. 767 (1881), on which petitioner relies (Pet. 4), has no application here. In that case, the government's consent to entry of judgment for the claimant waived any right to contest that judgment or underlying rulings of the trial court on appeal. Here, the Commission made no waiver and never consented to the order it appealed. Petitioner also cites (Pet. 4 n.2) numerous decisions by the courts of appeals that require "adverseness" as a condition precedent to review. The necessary adversity is present here, as it was in *United States* v. *Procter & Gamble Co.*, *supra*, where the Court noted that the government had at all times opposed the order of which it sought review. See 356 U.S. at 680.

[3] Contrary to petitioner's contention (Pet. 6), the decision below will not inundate the courts with appeals from interlocutory orders. The issue presented here is not likely to arise in a private action. It is unlikely that a private individual would stipulate to a dismissal of his individual claim in order to appeal a prior collateral order, such as the denial of class certification. Among other things, such action entails the serious risk that a subsequent action on the individual claim will be barred by the applicable statute of limitations, which does not bind the EEOC. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 366-372 (1977). Moreover, the Federal Rules of Civil Procedure permit a party to voluntarily dismiss its complaint without prejudice only once. See Fed. R. Civ. P. 41(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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